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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

NO.

RONALD S. MONROE,
Petitioner

Versus

ROSS MAGGIO, Warden,
Louisiana State Penitentiary,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Versus

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Procedural Disposition

Appellant has been twice tried and twice convicted for the murder of Lenora Collins; he has twice been sentenced to death. The first trial occurred on January 24, 1978. On direct appeal to the Louisiana Supreme Court, that conviction and sentence was reversed because of an error that occurred during the jury selection. See State v. Monroe, 366 So.2d 1345 (1978). Thereafter, appellant was retried on January 22, 1980 and again the jury convicted appellant of first degree murder and again appellant was sentenced to death. That conviction was affirmed by the Louisiana Supreme Court in State v. Monroe, 397 So.2d 1258 (1981).

STATEMENT OF THE CASE

i) Facts

Petitioner, Ronald Monroe, lived next door to Lenora Collins, the murder victim, at 1677 Religious Street in New Orleans, Louisiana. Mrs. Collins lived on one side of what is known in New Orleans as a shotgun double house with her two children, Joseph, who was twelve at the time of the murder and Theodise, who was eleven. Petitioner lived on the other side of the duplex with his mother and occasicnally other members of his family. During the summer and early fall of 1977 Mrs. Collins' mother, Inez Calhoun, finally succeeded in arranging the necessary financing to buy both halves of the duplex for her and her daughter and the children. This purchase meant that the Monroes would be forced to move from their side of the house immediately. Mrs. Calhoun sent a registered letter to the Monroes informing them that she had purchased the house and that she wanted to assume immediate occupancy. This letter was delivered to the Monroe house on September 9, 1977. Petitioner signed for the receipt of the letter.

The next night Lenora Collins was asleep in her house with her children in the same room because it was hot and that was the only air conditioned room in the house. Around 3 a.m. petitioner crawled into the victim's side of the house through a window and attacked the victim with a large knife. During the struggle that ensued the victim was stabbed many, many times by the petitioner. The children were awakened by the screams of their mother. Theodise tried to help her mother fight

with petitioner by picking up a can and hitting petitioner. Petitioner then stabbed Theodise once in the back puncturing her lung. At the same time, Joseph ran out of the house to get help. He first ran next door and told petitioner's mother to call the police because petitioner was stabbing his mother. Petitioner's mother refused to call anyone, and after a few moments, Joseph heard petitioner enter the back of the house shouting, "I got her, I got her." Doc. 1A, Tr. 1920, p. 117.

Joseph then ran from petitioner's house with the petitioner chasing behind him. The child succeeded in hiding from petitioner and eventually he arrived at his aunt's house, which is not far from the scene of the murder. Joseph immediately told the aunt that the petitioner had broken into his house and had stabbed his mother. The aunt, Carol McGraff, called the police and went to the victim's house. The police arrived and were told by Joseph that his neighbor, Ronald Monroe, had stabbed his mother. The police found the petitioner at his house with cuts on his hand; after the petitioner was taken to the front porch, Joseph identified him as the murderer. Theodise Collins, who had been taken to the hospital because of the serious wound inflicted upon her by petitioner, later also named Ronald Monroe as the murderer. Petitioner was arrested for first degree murder at the scene of the offense.

Petitioner has been twice tried and convicted for the murder of Lenora Collins; he has twice been sentenced to death. The first trial occurred on January 24, 1978. On direct appeal to the Louisiana Supreme Court, that conviction and sentence was reversed because of an error that occurred during the

jury selection. See State v. Monroe, 366 So.2d 1345 (1978). Thereafter, petitioner was retried on January 22, 1980 and again the jury convicted petitioner of first degree murder and again petitioner was sentenced to death.

In September of 1980, the New Orleans Police Department was contacted by Det. Joseph Gallardo of Pontiac, Michigan. Gallardo told Sgt. John McKenzie, of the New Orleans Police Department, that he had learned some interesting facts during his investigation of the stabbing murder of Erma Jean Lofton by George Stinson. Gallardo continued that Stinson was presently incarcerated in Michigan after having been arrested for this murder and that Francis Lee McWilliams, Stinson's cellmate, told Gallardo that Stinson confessed to killing Lofton.

Gallardo further related that McWilliams stated that Stinson remarked to him that his former common-law wife, Lenora Collins of New Orleans, had died the same way Lofton had. Gallardo stated that he had also learned from Linda Bridges, Lofton's sister, that Stinson had killed Collins of New Orleans. A full investigation later revealed that Bridges lived in New Orleans where she worked at a Popeye's Fried Chicken outlet with Joanne Monroe, petitioner's wife, who was the instigator of that rumor.

Sergeant McKenzie jotted down notes during his conversations with Gallardo and placed these notes in the mail slots of the officers originally assigned to the Collins murder investigation. These notes were discovered, untouched, immediately prior to the evidentiary hearing in the United States District Court for the Eastern District of Louisiana on January 30, 1984.

ARGUMENT

I.

Petitioner requests that this Honorable Court recommend a new trial as the proper federal constitutional remedy for post-conviction newly discovered evidence, citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The facts of the case at bar do not meet the specifications for a Brady violation, thus petitioner cannot avail himself to the remedy of a new trial. The law is clear in the State of Louisiana that the remedy for the discovery of new evidence after trial is a hearing on a motion for a new trial. Louisiana Code of Criminal Procedure Article 851.

The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment. Moore v. Illinois, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). While the Brady decision is clearly the most important disclosure case decided by this Court, several issues were left unresolved affecting the circumstances in which material "favorable" to the defense must be disclosed to the defense and the result of nondisclosure. Petitioner assumes the resolution of these issues and begs this Court to apply the Brady/Agurs standard after trial so as to discourage prosecutorial misconduct after trial in the same manner as it discourages prosecutorial misconduct before and during trial.

Petitioner's argument reflects a misunderstanding of this Court's constitutional concerns in Brady and United States

v. Agurs, 427 U.S. 98 (1976), which cases were solely concerned with the corruption of the trial process. The constitutional violation requiring reversal was one affecting the fairness of the trial. Unless the omission deprived the defendant of his right to a fair trial, there is no constitutional violation. Absent a constitutional violation, there is no breach of the prosecutor's constitutional duty to disclose. United States v. Agurs, supra, 96 S.Ct. at 2399, 427 U.S. at 108 (1976).

Brady was confined by its facts to situations in which a specific request is made for exculpatory material in possession of the prosecution at the time of the request. In Agurs, supra, this Court gave to Brady a broader affect by holding that some exculpatory material must be disclosed even without a request or where there has been but a general request.

However, in neither Brady, Agurs, nor any other Supreme Court case concerning disclosure of information in criminal cases, has this Court addressed itself to defining the existence or extent of any duty on the part of the prosecution to disclose information not in its possession during trial. See Napire v. Illinois, 560 U.S. 264, 79 S.Ct. 1173 (1959); Gilis v. Maryland, 386 U.S. 66, 87 S.Ct. 793 (1967); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 1562 (1972). There is no legal precedent for petitioner's contention.

Petitioenr relies on a United States District Court decision from the Western District of Arkansas in his contention that Brady be extended to the post-conviction setting. In the

Petition of Larry James Wright, 282 F.Supp. 999 (1968), the Court concluded that information favorable to the accused which the state possessed while a motion for a new trial was pending should have been disclosed. Factually the case differs drastically from the case at bar. Further, the precedential value of the **Wright** decision is limited in that it was not predicated upon **Brady**, though decided several years after **Brady**. To date **Wright** has never been cited as authority by any court in this country.

In the instant case the information the state failed to disclose did not even exist at the time of the conviction. Thus, the state could not have suppressed the evidence during trial. Suppression of evidence not in existence until after conviction could not have affected the fairness of petitioner's trial. Therefore, **Brady** and **Agurs** are inapplicable to the facts of this case.

The "evidence" which petitioner claims the State of Louisiana suppressed stems from a confusing, if not truly bizarre set of circumstances. Ronald Monroe was twice convicted in a trial by jury and twice sentenced to die in the electric chair for the murder of Lenora Collins.[1/] Petitioner had lived next door to Mrs. Collins in a style of home known in New Orleans as a double shotgun. On September 9 of 1977, Inez Calhoun, the victim's mother, had informed petitioner and his mother that they would have to move out of the other half of the home. The following evening, while Mrs. Collins was asleep

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1/ The first conviction was reversed on appeal for reasons not relevant to this inquiry. **State v. Monroe**, 266 So.2d 1345 (1978).

in the same room with her children, ages eleven and twelve, petitioner crawled into the victim's side of the house and repeatedly stabbed Mrs. Collins causing her death. The children witnessed the stabbing and tried to help. The youngest child, Theodise, was stabbed in the back and suffered a punctured lung. The older child, Joseph, ran next door and told petitioner's mother to call the police because petitioner was stabbing his mother. Petitioner's mother refused to call anyone. After a few moments, Joseph heard petitioner enter the back of the house shouting, "I got her, I got her." Joseph then ran, with Monroe in pursuit, to his aunt's house for help. Joseph's aunt called the police and then she and Joseph went to the victim's house. When the police arrived at the Collins house, Joseph told them that his next door neighbor, Ronald Monroe, had killed his mother and stabbed his sister. The little girl confirmed this in the ambulance on the way to the hospital. Ronald Monroe was arrested after he was found in his bed next door with a cut hand and bloody towels in his house.

On January 23, 1980, Ronald Monroe was again convicted of the first degree murder of Lenora Collins and sentenced to death. Review of the trial transcript supports this conviction. Appellant was identified as the murderer by two eyewitnesses whose testimony was uncontradicted by any neutral witness Testimony of the state's witness precluded the possibility of the victim's children being intimidated into naming Monroe as the killer. There simply was not enough time between the killing and Joseph Collins' report of the killing for this to have occurred.

In September of 1980, the New Orleans Police Department was contacted by Det. Joseph Gallardo of Pontiac, Michigan. Gallardo told Sgt. John McKenzie at the New Orleans Police Department that one George Stinsor was incarcerated in Michigan after having been arrested for the murder of his common-law wife, Erma Jean Lofton. Gallardo informed McKenzie that a man named Francis Lee McWilliams, Stinson's cellmate, told Gallardo that Stinson had confessed to killing Lofton, his common-law wife in Michigan. Gallardo further related that McWilliams stated that Stinson remarked to him that his former common-law wife, Lenora Collins of New Orleans, had died the same way Lofton had.

Contributing to the confusion emanating from the ambiguous statement made by Stinson concerning his wife in New Orleans, was a phone call Detective Gallardo received from one Linda Bridges, Ms. Lofton's sister, that she had heard that George Stinson had killed Lenora Collins of New Orleans. At first blush this statement appeared to bolster Detective Gallardo's suspicions regarding Stinson and the New Orleans murder. However, later testimony revealed that Ms. Bridges worked in New Orleans with the wife of petitioner at a fried chicken outlet. The motive of petitioner's wife in shifting the blame for the murder for which her husband was convicted is self-evident.

This information was relayed to Sergeant McKenzie of the New Orleans Police Department at several different junctures. McKenzie jotted down notes during these conversations using the word "confession" and phrase "bragged of killing his wife in New Orleans," but failed to reveal them to anyone. They were placed in the mailbox of the officers who had been in charge

of the Collins murder investigation and promptly forgotten. These notes were procured by William Campbell, the Assistant District Attorney handling this case on appeal, immediately prior to the evidentiary hearing in federal court.

Respondent would first clarify the ambiguous statement made by Stinson which petitioner has repeatedly attempted to mold into a confession. This simply cannot stand. The transcript of the evidentiary hearing held before the Honorable Marcel Livaudais, Jr., Magistrate of the United States District Court for the Eastern District of Louisiana reveals the testimony of George Stinson and Detective Gallardo regarding the content of Stinson's conversation with his cellmate, McWilliams. Testimony from this evidentiary hearing makes it clear that Stinson merely commented as to the coincidence of his common-law wife in Louisiana having died in the same way as his wife in Michigan.

Q. During your conversations with Mr. McWilliams did you ever mention your wife Leonora Collins?

A. I mentioned it to him.

Q. Did you tell Francis McWilliams anything about how she was killed?

A. Did I tell him anything about how she was killed?

Q. Right.

A. I told him that she was killed the same way Erma Jean Lofton was. (at 94).

Q. And did you ever tell him in any direct way that you had actually killed Lenora Collins?

A. I most certainly did not. (at 95).

(It must be noted that George Stinson was granted full immunity before testifying at this proceeding.)

Similarly, when the question was posed to Detective Gallardo, "Did Francis McWilliams ever tell you that Stinson told him he murdered that woman in New Orleans?" Gallardo's response was "No, Sir." (T.Tr.p. 27). In no way could a reasonable person conclude that these statements amount to a confession by Stinson to killing Collins, and petitioner should be admonished as to the continued use of this deceptive term.

Respondent would next address petitioner's contention that this case involves significant prosecutorial misconduct. This assertion is ludicrous. First, Sergeant McKenzie transcribed his notes and placed them where he assumed they would be found by the officers originally assigned to the case. Second, the District Attorney's Office had no knowledge of these notes until Mr. Campbell went to the police station and discovered the untouched notes himself. The facts simply do not amount to a post-conviction suppression of evidence. Further, as this Court held in Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568 (1972), the prosecution is not required to supply the defense with "a complete and detailed accounting . . . of all police investigatory work on a case."

Finally, these events cannot be construed to have been material or to have created a reasonable doubt as to the guilt of Ronald Monroe, in light of the strength of the evidence presented to the jury from which his verdict was rendered. In Agurs, supra, this Court explained the application of the principle underlying Brady, stating that it is the "character" of the undisclosed evidence which determines the obligation to disclose it. Id., 427 U.S. at 112; 90 S.Ct. at 2401. Logically, the

reliability of evidence, in some instances, is relevant to determine whether it is of a character discoverable under Brady. However, the obvious lack of reliability of information which appeared superficially to be favorable to the defense, must diminish the state's duty of disclosure.

Clearly, the information involved here had its source in rumor and innuendo and nothing more. Rumors were started independently by McWilliams, on the one hand, and Joanne Monroe, on the other hand. Both these persons had an interest in starting the rumor that Stinson, not Monroe, killed Collins in New Orleans. A convoluted chain of events was begun by the rumors. Repetitions and transmittals of the rumors caused their reinterpretation and embellishment. Eventually, the coincidence of Gallardo's hearing from independent sources, (Bridges, who repeated the rumor started by Joanne Monroe, and McWilliams, who misinterpreted what Stinson told him and believed that his transmittal of his version of Stinson's comment would lessen his own sentence), led Gallardo to credit the rumors. He relayed the information to McKenzie who misunderstood it and did not know its source. McKenzie's notes of the call reflect this misunderstanding of the content of the rumors started by persons who had an interest in starting them.

Respondent submits, and a thorough examination of the evidence produced at the hearing confirms, that the undisclosed information about Stinson was of the weakest type possible. It cannot be concluded that the State of Louisiana unlawfully suppressed evidence which produced a reasonable doubt as to the guilt of Ronald Monroe.

Since there has been no Brady violation, the petitioner is not entitled to a third trial. Instead, petitioner's remedy is a hearing on his motion for a new trial based on newly discovered evidence as outlined in Louisiana Code of Criminal Procedure Article 851.

Petitioner complains that the state court has already refused him a new trial based on the so-called Stinson confession and that sending him back to state court for relief prejudices his rights to a fair adjudication of his claim. However, as pointed out by the Fifth Circuit in its decision on this matter, **"Because an additional state hearing is to be held, in which all of the information will be considered, there is no possibility that Monroe's rights will be prejudiced."** In its reference to "all" of the information, the Fifth Circuit noted that when the state court heard petitioner's motion for new trial, it did not have all the information that was presented to the Fifth Circuit at the evidentiary hearing.

In the case at bar, the factual basis of petitioner's federal habeas application is much different from and stronger than that upon which the state court made its determination.

In the state court, petitioner alleged only that the state had received information regarding a so-called "confession" to the crime which petitioner committed,by an inmate in Michigan. However, as emphasized by the District Court, the state court had no knowledge of the existence of notes confirming the state's receipt of this information. Nor did the state court have the benefit of inspecting the content of the notes recording the

receipt of the information. [Findings & Conclusions, p. 9]. The existence of these notes (Exhibit 5 Evid.Hrng.) was confirmed only when the prosecution complied with petitioner's subpoena duces tecum prior to the evidentiary hearing in the United States District Court and after filing of the habeas application. Additionally, the state court did not hear New Orleans Police Officer McKenzie's testimony as to his actions following his receipt of the Stinson information:

> "Because the state court has not been afforded the opportunity to consider all the evidence in this matter, petitioner's claim has not been fairly presented to the state court and that court has not had an opportunity to examine the same claim now before this court."

The Fifth Circuit in Burns v. Estelle, 695 F.2d 847 (1983) stated: "For the claim to be exhausted, the state court system must have been apprised of the facts and the legal theory upon which petitioner bases his assertion." 695 F.2d at 849 (Emphasis added).

Furthermore, the court stated "We believe that the factual bases underlying petitioner's federal claim are significantly different from those underlying his state claim and, therefore, require a finding that Burns has not exhausted his state remedies." 695 at 850.

The Fifth Circuit reaffirmed the exhaustion requirement in a later case. In Brown v. Estelle, 701 F.2d 494 (1983), the court explained the exhaustion requirement:

> "The state courts must have an opportunity to pass on the claim in light of the full record and where the factual basis for a claim was not presented to the state courts, the claim is unexhausted. Where a federal habeas petitioner presents newly discovered evidence or other evidence not before the state court such as to place the case in a significantly different and stronger evidentiary posture than it was when the state court considered it, the state court must be given an opportunity to consider the evidence." (Emphasis added.) 701 F.2d at 495.

Petitioner's rights will not be prejudiced by this Court's respect of the comity between federal and state court.

Ronald Monroe in his petition relies on a 1938 case involving bankruptcy to support his contention that the doctrines of collateral estoppel and res judicata would be violated were this case to be reheard in state court. In Stoll v. Gottlieb, 305 U.S. 165, it was contended "that the ruling below disregarded decrees of the Court of the United States. . ." at 167. There is no issue here as to a state court disregarding a federal decree. In the instant case, the Fifth Circuit has affirmed the District Court's order that the state court afford Ronald Monroe a new hearing on his motion for a new trial. A state court can hardly do damage to the doctrines of res judicata and collateral estoppel by complying with the order of a federal court.

Petitioner at page 11 of his brief states, "The precise issue in this case has never been addressed by this Court. . ." Yet on page 14, the petitioner refers to "precedent." Petitioner's initial observaiton is correct. Brady is not ap-

plicable here as precendent and as such petitioner should not be granted a new trial by this Court. Brady is founded on the idea that a defendant is entitled to a fair trial and that the prosecution should not contrive to deprive a defendant of his ability to receive a fair trial by the suppression of exculpatory material. The fact remains that Ronald Monroe did receive a fair trial.

In Agurs, supra, at 2399, this Court states:

> "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose."

Petitioner further contends that to remand this case to state court for a hearing on a motion for a new trial would encourage suppression of exculpatory evidence by prosecutors. This is hardly the case in light of the fact that the state court may grant petitioner a new trial after the court hearing on the motion for a new trial. Such a possibility is most unpalatable to the prosecution. As such, petitioner is afforded adequate protection at the state court level.

II.

Petitioner contends that certiorari should be granted to resolve a conflict between the circuits regarding the issue of whether a "death qualified" jury is predisposed to favor the prosecution on the issue of guilt and is unrepresentative of the community as a whole.

Respondent would first point out that this "conflict" lies with one circuit and one circuit only - the Eighth Circuit Court of Appeals. In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the Eighth Circuit, in a borderline 5-4 decision, trailing an adament dissent, held that a capital jury, with jurors who hold absolute scruples against the death penalty excluded for cause, violated the defendant's Sixth Amendment right to a jury composed of a cross-sectional representation of a given community. The Court went further to conclude that, based upon the evidence before the District Court, death qualified juries are more conviction prone than a normal criminal jury.

This legal aberration cannot stand. The Fourth, Fifth, Seventh and Eleventh Circuits have pondered this very issue and realistically concluded that the exclusion of Witherspoon excludable jurors did not create a conviction-prone jury in violation of due process and the right to a jury selected from a fair cross-section of the community. Keeten v. Garrison, 742 F.2d 129 (4th Cir.1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir.1981); Rowan v. Owens, 752 F.2d 1186 (7th Cir.1984); Spencer v. Zant, 715 F.2d 1562 (11th Cir.1983).

The Fourth Circuit consolidated four habeas corpus petitions to resolve the sole issue of the constitutionality of death qualified juries at the guilt-innocence phase of capital trials. These petitioners urged that jurors opposed to the death penalty comprise a distinctive group in the community whose exclusion violates the Sixth Amendment. The Fourth Circuit, citing Lockett v. Ohio, 438 U.S. 586, 596-97, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978), disagreed:

> "Although the right to a jury trial includes the right to a jury venire drawn from a representative cross-section of the community, it does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case. The state as well as the defendant has legitimate and vital interests at stake at both the guilt and penalty stages of a capital case."

The four petitioners in Keeten, supra, similarly urged that the death qualification process impermissibly created conviction-prone juries in violation of the Fourtheenth Amendment's Due Process Clause. The U. S. Fourth Circuit Court of Appeals could find no merit in this contention, "The fact that a death qualified jury may be more conviction prone than one which includes jurors strongly opposed to the death penalty does not demonstrate which jury is impartial." 742 F.2d at 134. Borrowing language from the Fifth Circuit Spinkellink v. Wainwright decision, the Court continued, "Rather 'it indicates only that a death qualified jury might favor the prosecutior and that a nondeath-qualified jury might favor the defendant.'" 578 F.2d at 594.

In denying relief to these four petitioners, the Fourth Circuit stated that these petitioners were effectively stating that they had a constitutional right to a jury more likely to find them innocent than a death qualified jury. The Circuit Judges concluded in toto:* "Because petitioners are entitled only to an impartial jury, we conclude that the exclusion

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*/ Judge Butzner concurred with I and II and dissented from Part II, not relevant to this argument.

of WE's from their juries did not violate their rights under the due process clause."

The United States Court of Appeals for the Fifth Circuit, the jurisdiction from which this case has evolved, has consistently rejected the argument petitioner seeks to raise before this Honorable Court. Smith v. Balkcom, 660 F.2d 573 (5th Cir.1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). This Court has specifically held that the exclusion for cause of veniremen so unequivocally opposed to the death penalty that they would not follow the law on the subject was not violative of the constitutional right to an impartial jury. Smith v. Balkcom, 660 F.2d at 578. Circuit Judge Hill explained:

> "All veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. Clearly, the extremes must be eliminated--i.e. those who, in spite of the evidence, would automatically vote to convict to impose the death penalty or automatically vote to acquit or impose a life sentence. The guarantee of impartiality cannot mean that the state has a right to present its case to the jury least likely to convict or impose the death penalty, nor that the defense must present its case to the jury least likely to find him innocent or vote for life imprisonment. . ." Smith, at 579.

The Fifth Circuit unanimously concluded that the Constitution does not prohibit this judgment.

With regard to the issue of whether a death qualified jury is unrepresentative of the community as a whole, the Fifth

Circuit reasoned that any elimination of prospective jurors who are disqualified potentially impairs the achievement of a true cross-section on the particular jury. "Nevertheless, it must be remembered that a jury which reflects a fair cross-section of the community is a goal that is never to be achieved at the cost of leaving on the jury those veniremen who are legitimately disqualified." Smith, at 582.

The United States Court of Appeals for the Seventh Circuit resolved the unique issue of whether a "death screened" jury in a non-capital case was more likely to convict than an ordinary jury. The Court reasoned:

> "The pertinent question, however, is not whether a death screened jury is less partial to defendants, as it no doubt is, but whether it is likely to convict innocent people. If a death screened jury were thought to be so bloodthirsty as to be likely to convict the innocent, we very much doubt that such juries would be allowed in capital cases. But, if such juries just are more likely than other juries to convict the guilty, and thus to mediate impartially between the prosecution and the defense, we do not see how Rowan's right to due process of law could have been infringed." Rowan, supra, at 1190, 1191.

The Court concluded adamantly that Rowan had a right to a fair jury, not to a jury slanted in favor of guilty defendants.

In Spencer v. Zant, 715 F.2d 1562 (11th Cir.1983), the Eleventh Circuit dismissed petitioner's argument that he was denied his Sixth Amendment right to a representative jury from

a fair cross-section of the community because those who opposed the death penalty were excluded. The Eleventh Circuit rejected this argument as not consistent with law in that circuit, without discussion.

The Circuits faced with the issue of whether a death qualified jury is predisposed to favor the prosecution and is unrepresentative of the community as a whole, have unanimously rejected the proposition. Petitioner contends that in Witherspoon, this Court left the door open for a defendant to establish that the jury in his case was less neutral with respect to guilt. 391 U.S. at 520 n. 18. Petitioner argues that in the contradictory Eighth Circuit decision of Grigsby v. Mabry, supra, Grigsby closed that door through the use of statistical studies by showing that death qualified juries are more conviction prone than normal criminal juries. Respondent would iterate that the unfortunate Grigsby decision hung on the vote of one judge.

Judge Gibson, writing vigorously for the Grigsby dissent, stated, "The case before us essentially involves the refusal of such jurors to follow Arkansas law and consider the full range of penalties it provides, specifically the death penalty. As the Sixth Amendment does not require the representation of such jurors, we respectfully dissent." Grigsby, 758 at 244.

Judge Gibson noted that the Supreme Court has found only a Sixth Amendment right to have a jury selected from a representative cross-section. "The court today goes to extreme lengths to hold that a cross-sectional requirement applies to

petit juries as well as to venires or panels." at 144. Judge Gibson went on to berate his court's majority decision as in conflict with the law of his circuit, as stated in Pope v. United States, 372 F.2d 710 (5th Cir.1967), vacated on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968).

In Pope, Judge (now Justice of this Highest Court) Blackmon considered the jury selection process and repelled the argument that the exclusion of persons opposed to the death penalty "served improperly to produce a panel which was something less than representative of the community." Pope v. United States, 372 F.2d at 725, as quoted in Grigsby v. Mabry, 758 F.2d at 244. The Eighth Circuit in Pope concluded that the "point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn." Supra at 726. Judge Gibson further chided the Grigsby majority, "The court today thus blurs the distinction between jury panels and actual juries, in contravention of reality and precedent." 758 at 244.

Judge Gibson argued that the Grigsby majority, in framing the issue as whether "the evidence supported the district court's finding that a jury with WEs stricken for cause is a conviction prone jury," "leaps over and summarily assume(s) what is not true: that WEs are a distinctive group." 758 F.2d at 245. Cognizable classes have been said to include economic, social, religious, racial, political and geographical groups of the community. Thiel v. Southern Pacific Co., 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946), cited in Grigsby at 245.

Judge Gibson stressed the absurdity of his court's conclusion that WEs are a distinctive group: (at 245 & 246)

> "The court today, however, enters uncharted waters when it recognizes attitudes or opinions as sufficient to create a distinctive group. Attitudes or opinions, unlike the characteristics that underlie recognized cross-sectional groups, may change rapidly, whimsically, and without objective manifestation.
>
> "However, while individuals may be classified according to their expressed attitudes, the constitutional issue is whether such classification is durable enough and objective enough to create a recognizable group. If a jury panel were questioned closely enough, a great many additional classes might emerge. It would be absurd, however, to suggest that the Sixth Amendment would prevent the exclusion for cause of each such class."

Judge Gibson concluded that a distinctive group should have some recognition, some characteristic outside the narrow confines of the courtroom. **"A group of jurors who during voir dire examination in a criminal case express a particular attitude as to capital punishment does not meet this test." at 247.**

The dissent next attacked the court's holding that death qualified juries are conviction prone. Quoting a long line of United States Supreme Court cases Judge Gibson echoed that **"a representative jury does not include the jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." at 247.** See Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980); Lockett v.

Ohio, 438 U.S. 586, 596, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978).

The dissent continued: "The court thus apparently holds that impartiality under the Sixth Amendment requires a balancing on the jury as a whole of the jurors attitudes regarding the death penalty. The court's first error in this analysis lies in assuming that partiality as a legal concept is proven when factually it can be shown that juries with WEs removed are more conviction prone. In rejecting the majority court's hypothesis, Judge Gibson wrote:

> "To understand legal impartiality we may look either to the individual jurors or to the jury as a whole. If we look to the former, it is obvious that all jurors undoubtedly come to their task with a number of attitudes, opinions and 'biases' that may bear on the way they will view the trial. The crucial question is whether such views prevent them from taking and following their oath to consider and decide the facts impartially and conscientiously apply the law as charged by the court." at 249.

The dissent declined to enter into a detailed analysis of the "door-closing" Grigsby statistical studies: "It is enough to generally observe that an empirical study, no matter how carefully conducted, simply cannot duplicate accurately the proceedings in a courtroom under which a jury is selected and sworn to try the issues in a criminal case. The responsibilities placed on jurors in such circumstances are sobering and have a solemn impact upon them." at 248 FN 7.

Petitioner argues that because he possessed statistical data similar to that presented in Grigsby, he should have been allowed to present it to the United States District Court for the Eastern District of Louisiana and that a hearing should have been held. In upholding the Eastern District Decision, Judge Reavley of the Fifth Circuit Court of Appeals noted, "In this case, the court reviewed the findings of the state court and saw no reason for a separate evidentiary hearing. This denial was within its discretion under 28 U.S.C. § 2254(d) (1982)." Monroe v. Blackburn, NO. 84-3381, December 4, 1984.

In sum, petitioner requests that this Honorable Court grant certiorari to resolve the issues of whether death qualified juries are predisposed to favor the prosecution and are unrepresentative of the community as a whole. Respondent contends that the conflict lies within the Eighth Circuit and the Eighth Circuit must resolve its own inner strife. Currently the 5-4 holding in Grigsby stands conspicuously alone, juxtaposed against a scathing dissent by its own members as well as four different panels of circuit courts that have unanimously concluded that as a matter of law Witherspoon exclusions do no fail to produce impartial juries. This conviction should be upheld as sound in the jurisdiction from which it evolved.

III.

Petitioner maintains that defense counsel was so overburdened by a full docket that "he could not possibly" have rendered effective assistance of counsel as mandated by the Constitution. Basing a decision concerning ineffective assistance of counsel on such an assumption is prohibited by United

States v. Cronic, 104 S.Ct. 2039 (1984), which mandates that a claim of ineffective assistance of counsel must be supported by "specific errors made by trial counsel." (Cronic, at 2051). A presumption that the defense could not possibly have rendered effective assistance of counsel is allowed in only the most extreme cases, including a complete denial of appointment of counsel, [Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d (1963)], denial of the right of effective cross-examination, [Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)], and refusal by the trial court to allow the defendant to consult with his attorney during a recess, [Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)]. Ronald Monroe fails to allege an error of such magnitude. Petitioner "can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel" United States v. Cronic, supra, at 2051.

Additionally, a presumption exists as to the competence of the defense counsel at trial:

> "Whenever we are asked to consider a charge that counsel has failed to discharge his professional responsibilities, we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. The burden of demonstrating the contrary is on his former clients." Cronic, supra, fn 23 at 2045, citing Mattheson v. United States, 518 F.2d 1245, 1246 (C/A 71975).

The petitioner places great weight on the fact that defense counsel during the same month that he tried Ronald Monroe's case, tried two other capital cases and prepared for yet

another capital case as well as several felonies. Defense counsel John Lawrence, in reference to his workload during the time of Ronald Monroe's trial, stated, "It damned near killed me." (Lawrence Affidavit) Petitioner offers this statement in support of his contention that John Lawrence was so overburdened that there was no way that he could have adequately represented Ronald Monroe. Lawrence's statement would more likely indicate that he worked extremely hard on all his capital cases that month, including that of Ronald Monroe. To have done otherwise would not have "damned near killed" defense counsel.

Petitioner complains that John Lawrence failed to conduct even the simplest investigation in preparation for petitioner's sentencing hearing, citing Lawrence's failure to obtain and present testimony as to the petitioner's good character. As noted by the Fifth Circuit in its decision, though Lawrence did present a general argument against the death penalty to a Witherspoon-qualified jury, he "also put on evidence of Monroe's lack of a criminal record, his age and his intoxication on the night of the crime." It was within defense counsel's reasonable judgment to determine what information would have the most positive effect on members of the jury.

Petitioner's complaint of a dirth of character witnesses does not support his ineffectiveness claim. This Court in Strickland v. Washington, 104 S.Ct. 2052 (1984), at 2059, refers to findings of the trial court in Strickland which the court upheld:

> "The [trial] court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person. . ."

After convicting Ronald Monroe of stabbing a woman to death in the presence of her children, it can hardly be expected that members of that same jury would be swayed by a useless parade of individuals mouthing the praises of a convicted murderer.

Ronald Monroe's best character witness, his mother, did take the stand, yet even her testimony could not prevent the imposition of the death penalty.

Under the facts of this case, defense counsel's representation satisfied petitioner's Sixth Amendment right to counsel.

Lastly, petitioner complains of his counsel's failure to investigate the possibility that George Stinson committed the murder. There was no indication before or during the trial that George Stinson was a suspect worth investigating. After all, the state had two eyewitnesses to the crime. This Court in Strickland, surpa, at 2061, said that the scope of counsel's duty to investigate, ". . . depends on such facts as the strength of the government's case. . ." The two youngsters who witnessed the death of their mother gave the state a very strong case indeed. This Court in Strickland, supra, at 2061, refers

to the Fifth Circuit's observation that "**counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight. . .**" Statements made by Stinson to his Michigan cellmate, whatever their motive, did not come to light until well after the conclusion of Monroe's trial. This Court in Strickland, **supra, at 2065,** stated, "**A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.**"

Petitioner has failed to show that John Lawrence's representation of petitioner at trial fell below the standard of competent counsel as mandated by the Sixth Amendment. Furthermore, petitioner has failed to show any substantial prejudice suffered as a direct result of errors made by counsel at trial.

CONCLUSION

Based on the foregoing argument and jurisprudence, respondent requests that this Court deny petitioner request for a writ of certiorari.

Respectfully submitted,

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